

REFUGEES AND INDIA: AN OVERVIEW

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Abstract:

India is not a party to 1951 International Refugee Convention or the 1967 Protocol. As Indian borders are porous and government lack administrative, military or political capacity to enforce rules of entry. There is a need to formulate a new national policy or law on refugees to render protection.



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Introduction

India's status as a preferred refugee haven is confirmed by the steady flow of refugees from many of its sub-continental neighbours as also from elsewhere. India continues to receive them despite its own over a billion populations with at least six hundred million living in poverty with limited access to basic amenities. However, the Indian legal framework has no uniform law to deal with its huge refugee population, and has not made any progress towards evolving one either; until then, it chooses to treat incoming refugees based on their national origin and political considerations, questioning the uniformity of rights and privileges granted to refugee communities. Indeed, the National Human Rights Commission (NHRC) has submitted numerous reports urging the promulgation of a national law, or at least, making changes or amendments to the outdated Foreigners Act (1946), which is the current law consulted by authorities with regard to refugees and asylum seekers. The primary and most significant lacuna in this law is that it does not contain the term 'refugee'; consequently under Indian Law, the term 'foreigner' is used to cover aliens temporarily or permanently residing in the country. This places refugees, along with immigrants, and tourists in this broad category,¹ depriving them of privileges available under the Geneva Convention.² The author here examines the different dimensions relating to refugees in India and the roadblocks to formulate a new law which could render protection to the incoming refugees.

¹ Rajeev Dhavan, "On the Model Law for Refugees: A Response to the National Human Rights Commission (NHRC)," *NHRC Annual Reports 1997-1998, 1999-2000* (New Delhi: PILSARC, 2003).

² The 1951 Convention Relating to the Status of Refugees and the 1967 Protocol, "The 1951 Geneva Convention", UNHCR-Public Relations Section, <http://www.unhcr.org/home/PUBL/3b5e90ea0.pdf>

1. India and 1951 International Refugee Convention

India is not a party to the 1951 Refugee Convention or the 1967 Protocol. The question is often asked why India like most countries in South Asia is not a member of the 1951 UN Convention. In a recent article Weiner has offered, without directly addressing the issue, important insights into the question. He identifies some of the peculiar features of the South Asian region which need to be borne in mind in discussing the problem. First, none of the States in South Asia have the capacity to control population entry. Borders are porous and governments lack the administrative, military or political capacity to enforce rules of entry. Second, cross-border population movements in South Asia are regarded as issues that affect internal security, political instability and international relations, not simply the structure and composition of the labour market, or the provision of services to newcomers. Third, there is the possibility of a refugee flow changing the linguistic or religious composition of the receiving area within the country. Local anxieties are acute when there is a perceived threat of being culturally and/or economically swamped. For instance, in 1971, given the already substantial Bengali presence, some of the States in North-East India (Meghalaya, Assam and Tripura) were concerned that the influx from Bangladesh would result in the indigenous population becoming a minority in their own land. For these reasons, governments in South Asia have concluded that unwanted migrations, including refugees, are a matter of bilateral not multilateral relations and that international agreement could constrict their freedom of action. Indicative of the desire to deal bilaterally with the entire gamut of problems is the fact that the paramount regional organisation, South Asian

Association for Regional Cooperation (SAARC), has chosen to exclude the issue of population movements from its purview for fear that it would disrupt the organisation.³

Within this context we can identify other possible reasons why India has been reluctant to accede to the 1951 Convention. First, since India has been willing host to refugees it sees no reason for becoming party to the Convention, especially when it has allowed UNHCR to open an office in New Delhi. Second, because of its experience with what it regarded as the unhelpful role played by the UNHCR during the Bangladesh crisis of 1971, India has been wary of what may be described as the non-humanitarian or political role of UNHCR. Indeed, until recently UNHCR was perceived as an institution established and financed by the west to serve its geopolitical interests. Third, the rights incorporated in the 1951 Convention are seen as being unrealistic for a poor country. While India can invoke the reservation clause of the Convention, this will not provide sufficient protection against criticism coming from UNHCR and the NGO community. Fourth, a general lack of knowledge and understanding of international refugee law in official circles has prevented a deeper consideration of the issues involved, in particular, of the discretionary powers which would still be vested in the State on becoming party to the 1951 Convention. Finally, insofar as the current situation is concerned, the restrictive policies of the Western countries towards refugees do not provide the climate in which any state can be persuaded to become a party to the Convention.⁴

India has long maintained a general policy of not internationalising refugee problems and thus not seeking assistance from the international community. When the stay of the Tibetan refugees became prolonged the Government began a tentative reconsideration of this position. Initially

³ B. S. Chimni, The Legal Condition of Refugees in India, *Journal of Refugee Studies*, Vol. 7, No. 4, 1994, pp. 394-396.

⁴ Id.

UNHCR's involvement was rejected because the continued tensions with China meant that the Indian Government preferred not to have an official representative of UNHCR based in the country.⁵ However, in February 1969 a Branch Office was officially opened in Delhi and Mr. Frederik L. Pijnacker- Hordijk of the Netherlands was appointed UNHCR representative. In October 1969, India for the first time designated an observer to attend the sessions of the Executive Committee of UNHCR. In 1970 the role of UNHCR assumed new importance as attempts were made to speed up and consolidate the permanent settlement of Tibetan refugees. All this led to a close working relationship between UNHCR and the government.⁶

In April 1971, with the flood of refugees from East Pakistan, India called upon the United Nations for assistance; it was motivated to do so both because of the size of the problem as well as, in this case, the need and desire to internationalise the issue. Despite the initial protest of Pakistan, on 29 April 1971, the UN Secretary-General designated UNHCR as the focal point to coordinate assistance from all organisations and programmes. The High Commissioner, Prince Sadruddin Aga Khan, visited India and Pakistan in June to consult with the respective governments on relief measures and the problem of voluntary repatriation. The position of the High Commissioner was from the beginning a delicate one. However, to the extent that the relief programme was seen as palliative and repatriation the only solution, the activities of the High Commissioner and the means by which implementation of his programmes occurred threaded constantly through and around the political framework of the problem.⁷

⁵ Louise W. Holborn, *Refugees: A Problem of Our Time* (The Scarecrow Press Inc., Metuchen, New Jersey, 1975) p. 737.

⁶ Id. at p. 738.

⁷ Id. at p. 764.

Pakistan was seeking a UN presence on the eastern border with India so that it could control the situation inside East Pakistan by claiming the protective safeguards of domestic jurisdiction under the UN Charter.⁸ As part of this general strategy, Pakistan attempted to make use of the proposal of the Secretary-General that the voluntary repatriation of the refugees should be promoted under the auspices of UNHCR. Expectedly India refused to be trapped. In November, the High Commissioner made a second journey to India and Pakistan, the issue of voluntary repatriation came up once again. The fact of the matter was that it was inextricably tied up with the military and political situation on the ground. This led to the feeling in India that UNHCR was not confining itself to playing its non-political and humanitarian role but was transgressing traditional boundaries.⁹

Nevertheless, since 1981, when a significant number of refugees arrived from Afghanistan and Iran, the Government of India has allowed a UNHCR presence in India. However, UNHCR is only allowed a nominal presence, the UNHCR mission in New Delhi is required to function under the banner of the UNDP (United Nations Development Programme). But the relationship between the Indian Government and the Office of the UNHCR is evolving in a positive direction. In 1993, India agreed to allow UNHCR to oversee the voluntary nature of the repatriation of Sri Lankan Tamils, although denying it the same role in the case of the Chakma refugees. Finally, there is much greater interaction and cooperation between the Government and UNHCR and thus reason to believe that the relationship between the two will significantly improve in the coming years.¹⁰

⁸ C.S.R. Murthy, *India's Diplomacy in the United Nations* (Lancer Books, New Delhi, 1993), p. 53.

⁹ Id.

¹⁰ Supra note 3, p. 396-398.

India's initiative to become a member of the Executive Committee was dictated by several factors. First is, of course, its more positive experience with UNHCR in recent years. Second is the fact that Pakistan has been a member of the Executive Committee since 1988 and could use the body to agitate against India's national interests. Finally India is seeking to become a member of the UN Security Council. It can hardly hope to see its urging taken seriously if it does not play its due role in an important UN organisation such as UNHCR.¹¹

2. Overview of Refugees Situation in India

Despite these factors, the current number of refugees and asylum seekers in India stands at approximately 435,900 according to the World Refugee Survey 2007 conducted by the United States Committee for Refugees and Immigrants (USCRI),¹² and supported by the latest figures from the United Nations High Commissioner of Refugees (UNHCR). According to these sources, new asylum seekers for 2007 numbered about 17,900, in contrast to the mere 600 recorded departures from the country. India mostly plays host to refugees from its neighbouring countries who are either forced to leave their countries of origin due to internal or external conflict, political persecution or human rights infringements. India has offered refugee status to asylum seekers from countries like:

1. China: Refugees and asylum seekers from Tibet number around 110,000.
2. Nepal: Excluding migrant workers, the population stands at 100,000 refugees. However this number is not usually considered because of the Indo-Nepal Friendship Treaty.¹³

¹¹ Id.

¹² "World Refugee Survey 2007" United States Committee for Refugees and Immigrants, http://www.refugees.org/WRS_Archives/2007/48-69.

¹³ "Treaty of Peace and Friendship between the Government of India and the Government of Nepal", Ministry of External Affairs, Government of India, <http://www.meaindia.nic.in/searchhome.htm>

3. Sri Lanka: Total strength of conflict induced refugees of Tamil origin stands at 99,600.
4. Myanmar: Currently 50,000 refugees and asylum seekers.
5. Bangladesh: The mass exodus following the 1971 war has come down to 35,000, following repatriation of refugees.
6. Afghanistan: 30,400 refugees and asylum seekers comprised mainly of Hindus and Sikhs.
7. Bhutan: The ethnic Nepalese population settled in India amounts to 10,000 refugees and asylum seekers.¹⁴

The circumstances underlying the exodus of refugees from their countries of origin vary from political persecution in the case of the Chin refugees of Myanmar to civil war with the community of Sri Lankan Tamils caught between the Tamil nationalists and the Sinhalese government. However, it is clear that all these refugee populations deserve their basic human rights and the assistance that can be afforded by the Government of India. To define the word 'refugee' in Indian legal terms is theoretically not possible since neither the Foreigner's Act (1946) nor its amendments or additions, contains or defines the term. However, this study shall consider the definition propounded by a commission chaired by Justice P N Bhagwati in 1997,¹⁵ whose task was to construct a uniform national law on refugees. Although the bill was never tabled in Parliament, the term 'refugee' was adequately defined in the 'Model Law' as either any person who is outside his/her Country of Origin and is unable or unwilling to return to, and is unable or unwilling to avail himself /herself of the protection of that country because of a well founded fear of persecution on account of race, religion, sex, ethnic identity, membership of a

¹⁴ "World Refugee Survey 2007" US Committee for Refugees and Migrants, available at <http://www.refugees.org/article.aspx?id=1941>

¹⁵ Drafted under the auspices of the Regional Consultations on Refugees and Migratory Movements in South Asia Initiative in 1995, with Justice P.N.Bhagwati as the Chairperson of the Drafting Committee of the India-specific version of the national law on refugee protection.

particular social group or political opinion or ... owing to external aggression, occupation, foreign domination, serious violation of human rights or events seriously disrupting public order in either part or whole of his/her Country.¹⁶

It is important to note that India is not a signatory to the 1951 Convention relating to the status of refugees or the 1967 Protocol. This makes India's international position in terms of treatment of refugees, disputable. However, it is equally important to note that India is a signatory to various other international and regional treaties and conventions relating to universal human rights and refugees such as the UN Deceleration on Territorial Asylum (1967), the Universal Declaration of Human Rights (1948), and the International Convention on Civil and Political Rights (1966).¹⁷ India is also a member of Executive Committee (ExCom) of the UNHCR which approves and supervises the material assistance programmes of the UNHCR; all this without actually supporting or acknowledging the role of the UNHCR on its own territory. Taking this into account, it is clear that India respects international treaties on the treatment of people residing within its territory; but, it chooses to maintain its own administrative arrangements for dealing with temporarily or permanently settled refugee communities, while providing the UNHCR little room to assist except in emergency situations like the displacement of Chakma tribals from Bangladesh or rehabilitation of refugees from Afghanistan or the Autonomous Region of Tibet.¹⁸ It was estimated in 1998 that out of more than 300,000 refugees in India, only 18,500 have

¹⁶ Rajeev Dhavan, *Refugee Law and Policy in India* (New Delhi: PILSARC, 2004), P. 156.

¹⁷ T Ananthachari, "Towards a National Refugee Law for India", in P R Chari, Mallika Joseph, and Suba Chandran (eds.), *Missing Boundaries: Refugees, Migrants, Stateless and Internally Displaced Persons in South Asia* (New Delhi: Manohar, 2003), p. 99-107.

¹⁸ Sarbani Sen, "Paradoxes of the International Regime of Care", in Ranabir Samaddar (ed.) *Refugees and the State: Practices of Asylum and Care in India, 1947-2000* (New Delhi: Sage Publications, 2003), p. 404-405.

received UNHCR protection.¹⁹ The restricted role of the UNHCR as the international watchdog body provides the basic reason for Indian policymakers to establish the framework of a uniform national law on refugees to meet international criticism regarding the condition of refugees in the country.

3. Roadblocks to Formulating a Law

For every reason that points to an impending need for such a law, there seems to be an equally large number of reasons that policymakers have given for opposing it, urging that India should remain content with the Foreigners Act and that passage of a refugee law would hinder Government of India's policy concerning refugees. Despite the fact that even bodies like the National Human Rights Commission (NHRC) have sponsored requests for making changes to the Foreigners Act or formulating a new law, policymakers continue to remain obtuse on this issue. On 2 October 1997, the NHRC initiated a dialogue with senior officers of the Indian Ministry of External Affairs requesting them to examine afresh the possibility of India becoming party to the 1951 United Nations Convention relating to the Status of Refugees and the 1967 Protocol on the subject. The Commission is of the view that it is essential that India develops a national policy and possibly a national law, fully in consonance with the 1951 UN Convention and the 1967 Protocol have been recounted in its earlier reports.²⁰ It is clear that there are more pressing obstacles on the government and policymakers than human rights infringements perpetrated by their own authorities. One of the reasons behind the hesitancy to move forward with the law is that the current arrangement of managing the influx of migrants and asylum

¹⁹ H K Thames, "India's Failure to Adequately Protect Refugees", Washington College of Law 2000, available at <http://www.wcl.american.edu/hrbrief/v7i1/india.htm>

²⁰ Rajeev Dhavan, "On the Model Law for Refugees: A Response to the National Human Rights Commission (NHRC)", *NHRC Annual Reports 1997-1998, 1999-2000* (New Delhi: PILSARC, 2003).

seekers through ad hoc administrative decisions, based on political and security considerations, rather than specific legislative enactments is politically more convenient on the basis of India's bilateral relations with the country of origin of the refugees in question. Since India has different treaties with its neighbouring countries, a uniform law to deal with the refugee groups would not be politically or practically viable. As stated in *Paradoxes of the International Regime of Care*, "India has concluded that unwanted migrations, including those of refugees, are a source of bilateral and not multilateral relations, and international agreements could constrict her freedom of action."²¹ This sheds some more light on India's reluctance to sign the International Convention or the Protocols on refugee law. Security considerations rank high on India's list of priorities, given its geopolitical influence in the region and its vulnerability to cross-border infiltration due to the porous nature of its borders. Taking this factor into account, anti-refugee law legislators argue that the proposed law would encourage more refugees to enter India, with promises of increased legitimacy, more rights and government services, which will increase the threat of social, economic and political insecurity. Mahendra P Lama in his report 'Managing Refugees in South Asia'²² provides a three-dimensional model to explain the risk to national security through refugee movements that present different threats due to

1. Strategic-level security, when Refugees are armed and when the Government loses control over the refugees.
2. Structural-level security is threatened by increasing demands on and conflict over scarce resources.

²¹ Sen., supra note 18, p. 404-405.

²² Mahendra P. Lama, "Managing Refugees in South Asia", Refugee and Migratory Movements Research Unit (Dhaka: Refugee and Migratory Movements Research Unit, 2000), p. 19-24.

3. Regime-level security is threatened when refugees enter the domestic political process and create pressures on the government.

According to the Indian policymakers, these three dimensions of threat heighten the risk of further inward refugee movements, and present an obstruction to the formation of any law. However, these three dimensions lie in the sphere of political security. What is feared more among the local populace in a refugee-populated area is the risk they pose to economic and social security. Inadequate relief to refugees can lead to civil unrest, as in the case of the Sri Lankan Tamil refugees. India has also been used as a base for terrorist operations in the past which has led to disastrous consequences like the assassination of former Indian Prime Minister Rajiv Gandhi by the Liberation Tigers of Tamil Elam (LTTE) cadres. The full dimensions of the refugee threat to economic and social security has been seen in Pakistan which harbours more than a million Afghan refugees, mostly concentrated in its North-West Frontier Province (NWFP) which has become an area of lawlessness and a centre for small arms and opium trade. Another risk associated with the encouragement of more refugees would be the problem of migrant labourers in search of work presenting themselves as refugees. The difference between the two is that refugees are those who are forced to flee their homelands due to conflict and persecution, while migrants are those who cross borders in search of employment and better economic opportunities. This is a simple distinction that can be established through a basic screening process but policymakers feel that a uniform law would encourage a larger migrant movement for whom employment and income generation would have to be provided, in terms of the clauses of the proposed Model Law.²³

²³ Id.

A third factor contributing to the legislators' hesitancy is their contention that India is observing the basic tenets of treatment of refugees as proposed in the Model Law and the Convention. India's Supreme Court has gone so far as to extend the application of Article 14 (Right to Equality) and Article 21 (Right to Life and Dignity) to everyone, including migrants and refugees residing within the territory of India, and also basic human rights as defined by the UN have been conferred upon the refugees. In addition, policy watchdogs claim that India affirms the principle of non-refoulement which is integral to any law on refugees. This prohibits the expulsion of a refugee to another country, including his/her country of origin, if he or she might again be subjected to persecution. However, despite the fact that the MEA and the Union Government have acknowledged the NHRC's numerous reports and recommendations advising the need for a separate law, policymakers continue to cite the irrelevant fact that any discrepancies that may exist in the human rights aspect of dealing with refugees are adjudicated by the NHRC which acts as a watchdog authority, and that until it suggests otherwise (which they have in fact on numerous occasions), a change in legislation is highly unlikely.²⁴

Conclusion

India is a refugee receiving state from many neighbouring countries, albeit it is not a signatory and party to the 1951 International Refugee Convention or the 1967 Protocol. United Nations High Commissioner for Refugees (UNHCR) is only allowed a nominal presence in India. As international borders are porous and government lack the administrative, military or political capacity to enforce rules of entry. There is a lack of political will to help refugee exodus from many countries due to several reasons. Since Pakistan is a member of Executive Committee of

²⁴ Id.

UNHCR from 1988 and could use the UN body to agitate against India's national interests. Population movements affect internal security, political instability and international relations. There is no legal mechanism in India to deal with refugees, although use of outdated Foreigners Act, 1946 in refugee situations is carried out but it is not enough legal document to deal with refugees. There is a need for a separate national policy or law which could render protection to refugees but at the same time many policy makers feel that such a new law could encourage more refugees to India and jeopardise social, economic and political instability.

